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Who's a Good Boy? US Supreme

Court Considers Again Whether Dog Sniffs Are Searches

Sherry F. Colb Jan 16, 2019

The US Supreme Court is currently considering whether to grant review in Edstrom v. Minnesota. The case presents the issue whether police must obtain a search warrant before bringing a trained narcotics dog to sniff at a person's door for illicit drugs. The Minnesota court held that police need no warrant, and the petitioner (as well as amici in the academy) have challenged that conclusion. In this column, I will consider some of the most interesting arguments that bear on the issue that may come before the Court.

Dog Sniffs and Prior Cases

The Supreme Court has previously had occasion to rule on the constitutional significance of a dog sniff for contraband. In United States v. Place, the Court said (in dicta) that a trained police dog may sniff at a suspect's suitcase without triggering application of the Fourth Amendment. The Court explained that a dog sniff exposes only the presence or absence of contraband and is accordingly unintrusive. Under Katz v. United States, as subsequently interpreted, police need no warrant, no probable cause, and no reasonable basis for investigating, in the absence of a reasonable expectation of privacy that police intend to infringe.

The dicta became holding in Illinois v. Caballes. The Court there held that police may, without a warrant or probable cause, deploy a trained narcotics dog to sniff at—and thereby expose the presence of contraband within—a vehicle. The Court said that people lack a reasonable expectation of privacy in the fact that they possess contraband, the only fact that a dog sniff of the kind at issue might disclose. An earlier case, United States v. Jacobsen, unrelated to dogs, had similarly approved of investigative measures that precisely expose a guilty fact about a suspect's property with only minimal interference with property or privacy.

After these cases came down, it seemed that a dog sniff—assuming no physically intrusive behavior by the dog (or human)—fell outside the scope of Fourth Amendment protection. In Florida v. Jardines, however, things took a surprise turn. There the Court held that police had violated the Fourth Amendment when a trained narcotics dog whom they brought to the door of a suspect's home moved around the front door in a lively fashion to trace the smells coming out of the house, all without a warrant. In a concurrence in the judgment, Justice Kagan said that we should view the trained narcotics dog as analogous to a piece of technology, and the Court had already held in Kyllo v. United States that using technology unavailable to the general public to detect what is happening inside a home constitutes a "search" for Fourth Amendment purposes, presumptively requiring a warrant.

Note two observations that one could make regarding *Jardines* and the majority and concurring opinions. One is that maybe dog sniffs are sometimes

searches, notwithstanding *Place* and *Caballes*, perhaps when they disclose the contents of a home. A second is that the concurring opinion would treat dogs as essentially the equivalent of thermal detection devices, the latter of which violate the Fourth Amendment when police lack a warrant, even if police use them from public property at a distance from the home. These justices might accordingly view trained narcotics dogs sniffing the air down the block from a suspect's home as engaged in a Fourth Amendment "search" that requires probable cause and a warrant.

In *Jardines* itself, however, Justice Scalia says that the Court's decision is not about dogs: "It is not the dog that is the problem," he states, "but the behavior that here involved use of the dog. We think a typical person would find it "'a cause for great alarm'" (the kind of reaction the dissent quite rightly relies upon to justify its no-night-visits rule) to find a stranger snooping about his front porch with or without a dog." If a human were to go up to the front door and start wildly sniffing at it and tracking back and forth, inhaling the scent, he too would be engaging in a search. The Court recognizes a limited license in the area around people's homes for neighbors and solicitors and others to walk up to the door, knock, wait a short while, and then leave if no one invites them to come in or remain on the property. Anyone whose behavior deviates from this expected course of conduct has exceeded the scope of the implied license to approach the house and is engaged in a trespass. When the police are the ones who exceed the license in this way, they participate in a Fourth Amendment "search" and must justify their conduct with probable cause and a warrant or exigency.

Understanding *Jardines* as a case about the scope of the implied license to approach the house, rather than as a case about the use of a "sense-enhancing" dog, the sniff of a door appears unremarkable. So long as the dog does nothing that a neighbor's dog would not do on an attempted visit, police have not searched. Perhaps the fact that the dog's nose touched various parts of the suspect's front door ought to matter, but if it does, it seems like a trivial basis for finding a Fourth Amendment violation. A neighbor's dog might just as well have touched his or her nose to the door too.

But Maybe…

One of the themes that came through in *Kyllo* was that inside the house,

everything is private. The Court has long treated the house as special, despite the fact that the text of the Fourth Amendment does nothing to distinguish between "persons, houses, papers, and effects" in protecting against unreasonable searches and seizures. Police may search cars on probable cause, without warrants, under California v. Acevedo, and police may seize bags and even arrest people on the basis of probable cause, without warrants. Entering a house, by contrast, generally requires a warrant. It is because we may all share the intuition that houses are different that police approaching the door with a dog who will detect contraband may seem like a search, even if dog sniffs of one's car are not.

I think most of us regard the home as a place where we can relax and stop putting on a face for public consumption. We can talk about things on which we would otherwise keep our own counsel. We can wear whatever we like and watch whatever we want to watch on television. We can go to sleep early or wake up late, and we can drown our sorrows in the liquor cabinet. Some of what we do may be immoral or reprehensible, but we are at home, and it is nobody's business.

There are limits to this principle, however. We lack permission to murder our romantic rivals, even inside our own homes. We have no right to hack into a neighbor's bank account or send libelous letters about him to the newspaper, even from our home computers. And most relevantly, we lack a license to possess illicit drugs, whether inside or outside of our homes. Recall the principle that led the Court to grant police authority to rely on trained narcotics dogs in the first place: dogs expose only one fact: the target either does or does not have illicit drugs in his car, in his suitcase, or on his person. No one is entitled to expect privacy in the simple fact that he is engaged in illegal activity. Therefore, the Court concluded, a dog sniff invaded no reasonable expectation of privacy and was not a search.

One way to think about it is that the purpose of privacy is not to enable criminals to get away with and hide their misconduct from the police. Sometimes, respect for privacy rights leads to criminal evasion of law enforcement, but we are to think of those occasions as collateral damage rather than as intended outcomes. Accordingly, when police disturb no innocent privacy in the course of learning whether a suspect is indeed in possession of contraband, they leave all of the suspect's legitimate privacy—and thus his

Fourth Amendment rights—intact. This conclusion follows whether police are learning about contraband in a suitcase or whether they are learning about contraband in a house.

Yet the image of a police dog sniffing at one's door can be unsettling. For one thing, it stigmatizes the person behind the door. For another, it exposes something about the home, even if it is something criminal.

One can mobilize responses to such concerns. Whatever stigma attaches would similarly attach if police stood at the door without a dog, for a so-called "knock and talk." It would also attach if police approached the suspect outside the home and had a dog sniff an attaché case.

There is therefore nothing uniquely stigmatizing about a dog sniffing a home. What is different is that the home is involved. In a rather strange case, Stanley v. Georgia, decided in 1969, the Supreme Court held that the State had violated the First Amendment freedom of speech by criminalizing the possession of obscene materials in the home. The case was odd, because the Court had previously held in Roth v. United States that the First Amendment provides no protection for obscene materials; obscenity is one of the categories of *unprotected* speech. Police in *Stanley* were legally on the premises where they found the obscene matter, and obscenity is unprotected speech. Why did the Court rule as it did?

I have talked about *Stanley*before, and I think it is impossible to really justify it, based on First Amendment doctrine alone. One way to understand it, however, is to recall that the Court views the home as "different," much in the way that it views the death penalty as "different". Though the legislature may criminalize any activity, so long as the Constitution provides no substantive protection for that activity, the home properly insulates people from searches for relatively unimportant crimes. Possession of obscenity may be illegal, in other words, but it may not provide a basis for entering a person's private home (or for passing a criminal statute that punishes people who have it in their homes). On this theory, drug possession may be illegal, but it may not provide a basis for approaching a person's home with a narcotics trained dog. It is better that trivial crimes within the home remain undiscovered than that police approach a home with a living being who can tell what's in the home and thereby discover the drugs. I think the concurring justices' view in *Jardines* tracks that sort of

thinking (minus the foolishness of regarding a dog as drug-detection technology). Perhaps, if the Court takes the case, this view of the home as insulated from what would otherwise represent legitimate investigation will carry the day.

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Sherry F. Colb, a Justia columnist, is the C.S. Wong Professor of Law at Cornell Law School. Her most recent book, Beating Hearts: Abortion and Animal Rights (co-authored with Michael C. Dorf) addresses some of the common puzzles, themes, and challenges that animate and confront both the pro-life and animal rights movements.

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